(6)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-1449

In the Supreme Court of the United States

OCTOBER TERM, 1985

TOWN OF NEWTON, ETC., ET AL.,
PETITIONERS,

v.

BERNARD E. RUMERY, JR.,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 28, 1986
CERTIORARI GRANTED APRIL 21, 1986

6/1/87

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

No. C.84-279-L

BERNARD E. RUMERY, JR.

v.

TOWN OF NEWTON, et al.

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1984		
Apr 13	1	Cmplt/JURY DMD.
Apr 16		Sms issd
26	2	Summons with Deputy Sheriff's Returns on all defendants dated 4/18/84
May 4	3	APPEARANCE for Deft Barrett by Charlton J. Swasey, Esq.
	4	ANSWER of Deft Barrett w/ Jury Dmd.
9	5	SPECIAL APPEARANCE for all defendants by James S. Yakovakis, Esq.
	6	Dft's Motion to Extend Time for Filing Answer to 6/15/84
23		On #6, Mot. gr. Rule 11. (KN) (EOD 5/23/84) cc attys
Jul 2	7	APPEARANCE for Barrett as Chief and Town of Newton by Devine, Millimet, Stahl & Branch — Donald E. Gardner, Esq.
Jul 5	8	Defts' ANSWER
Sept 13		PRELIMINARY PRETRIAL HELD BEF. BARRY, MAG.
20	9	PRETRIAL ORDER (WHB) (EOD 9/21/84) cc attys (dfts to file Mot. to Dis. by 12/15/84, Plff to resp. by 1/1/85) (if case not dismissed on motion, further pretrial to be set)

DATE	NR	PROCEEDINGS
Dec 14	10	Defts' Mot for Ext of Time to File Mot to Dis/SJ to 2/15/85
26		On #10, Mot. gr. R11. (JRS) (EOD 12/27/84) cc attys
1985		
Feb 15	11	Dfts' Motion to Dismiss/Petition For Declaratory Judgment
	12	Dfts' Memo in Support of Motion to Dismiss/ Petition for Declaratory Judgment
22	13	Plff's Obj. to Dfts' Motion to Dismiss/Petition For Declaratory Judgment
	14	Plff's Mot to Ext Time to File Memo in Opp to Mot to Dismiss/Petition for Declaratory Judgment to 3/4/85
		On #14, Mot. gr. R11. (JRS) (EOD 2/22/85) cc attys
	15	Plff's Motion to Amend Complaint to Add Count VII
Mar 4	16	Pltf's Memo of Law in Support of Obj to Defts' Mot to Dis/Pet for Declaratory Judgment
6	16½	Defts' Mot to Disallow or, in the Alternative to Dis Count VII w/ Memo
14	17	Dfts' Reply Memo Supporting Motion to Dismiss/Petition for Declaratory Judgment
15	18	Plff's Obj. to Dfts' Mot to Disallow Or, In the Alternative, to Dismiss Count VII of the Complaint, if Amended
	19	Memo of Law In Support of Plff's Obj. to "Dfts' Mot to Disallow or, in the Alternative, to Dismiss Count VII of the Complaint, if Amended"
	20	Addendum to Dfts' Reply Memo Support Motion to Dismiss/Petition For Declaratory Judgment
Mar 25	21	WITHDRAWAL by Charlton J. Swasey, Esq.

DATE	NR	PROCEEDINGS
1985		
Mar 27	21½	Defts' Reqs for Findings of Fact and Rulings of Law RE Covenant Not to Sue Executed by Pltf
Mar 27		HEARING RE All Pending Motions was held before Loughlin, J. D. Bonila was the Reporter. Evidence was introduced.
	22	Record of Courtroom Minutes
	22½	Parties' Exhibit List
Apr 5	23	Pltf's Req for Findings of Fact and Rulings of Law RE Covenant Not to Sue
Apr 8	24	Defts' Add'l Reqs for Findings of Fact and Rulings of Law in Connection with Covenant Not to Sue Executed by Pltf
Apr 29	25	Order on Mot to Dis and/or Pet for Declaratory Judgmt (MFL) (EOD 4/29/85) cc attys Defts' mot to dis gr.
Apr 30	26	JUDGMENT (JRS) (EOD 4/30/85) cc attys
May 6	27	Pltf's Obj to Court Order Dtd 4/29/85 Dis Complt
15	28	Pltff's NOTICE OF APPEAL to CCA (cc: Attys) (EOD: 5/15/85) Desig. & Transcript ltr. w/ copy of docket to cnsl Desig. due: 6/4/85 $70.00 Appeal fee Rec'd recpt # 5382 $5.00 Clerk fee, $65.00 CCA
Jun 12	29	Pltff's Designation of Record and Items on Appeal
24	30	Clerk's Certificate to CCA (copy) (cc: Attys) (EOD: 6/24/85) w/ cert of dkt. File forwarded to CCA on appeal w/ cert copy of dkt. Reg. Mail

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1508

BERNARD E. RUMERY, JR.,
PLAINTIFF, APPELLANT,

v.

TOWN OF NEWTON, Etc., Et Al.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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NO. BELOW: CA: 84-02791
JUDGE BELOW: Loughlin, J.
DATE OF JUDGMENT: April 30, 1985
NOTICE OF APPEAL FILED: May 15, 1985
[CIVIL RIGHTS]

DOCKET ENTRIES

DATE	FILINGS — PROCEEDINGS
1985	
July 5	Copy of notice on appeal and docket entries received and filed and case docketed. Record on appeal in one volume, received and filed. Notices mailed. (ns)
July 5	Transcript Order, re
July 10	Appearance of G. Wells Anderson, for the appellant, received and filed. Docketing statement, received and filed. (df)
July 15	Statement of issues and designation of contents of appendix, received and filed. (df)
July 19	Supplemental certificate of No. 31 (transcript of hearing dated 3/27/85 & an envelope, received and filed. (lb)
July 25	APPEARANCE OF Donald E. Gardner, Esquire, for David T. Barrett and the Town of Newton, NH, received and filed. (ar)
Aug. 5	Appearances of Brian T. McDonough and James S. Yakovakis, for the appellees, received and filed. (df)
Aug. 8	Brief and appendix for appellant, Bernard E. Rumery, Jr., received and filed. Notices mailed. (sb)
Aug. 9	Transcript order of court reporter received and filed. (lb)
Aug. 19	Motion filed, without objection. Order (Torruella, J.) enlarging time for appellees to file their brief to and including September 12, 1985. Notices mailed. (lb)
Sept. 12	Brief for appellees, received and filed. (sb)
Sept. 30	Assigned for hearing at the October 1985, session. (df)

DATE	FILINGS — PROCEEDINGS
1985	
Oct. 4	Appearance of Charles P. Bauer, Esq. for appellant received and filed
Oct. 8	Heard before Coffin, Breyer and Timbers, JJ (df)
Dec. 2	JUDGMENT: The judgment of the district court is reversed and the cause is remanded to the district court for further proceedings consistent with the opinion filed this day. Opinion of the Court by Timbers, J. Notices mailed. (ns)
Dec. 12	Verified and itemized bill of costs in favor of appellant, received and filed. (al)
Dec. 24	Mandate Issued. Copy filed. Taxation of costs filed. Original papers returned to the district court and notices mailed. (jn)
1986	
Mar. 10	Notice of filing petition for certiorari from Supreme Court. (No. 85-1449, February 28, 1986) received and filed. (lb)
Apr. 25	Order from the Supreme Court granting the petition for a writ of certiorari (April 21, 1986), received and filed. (ns)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

No. C.84-279-L

BERNARD E. RUMERY, JR.

v.

TOWN OF NEWTON, et al.

TRANSCRIPT OF HEARING BEFORE THE HONORABLE MARTIN F. LOUGHLIN

Wednesday, March 27, 1985
10:00 O'Clock, a.m.

Appearances:

For the Plaintiff: Hall, Morse, Gallagher & Anderson
G. Wells Anderson, Esq.
Charles P. Bauer, Esq.

For the Defendants: Devine, Millimet, Stahl & Branch
Donald E. Gardner, Esq.
James S. Yakovakis, Esq.

• • •

[3] STEPHEN J. C. WOODS
having been duly sworn, testified as follows:

• • •

[4] *Direct Examination*

(Questions by Mr. Gardner)

Q. Mr. Woods, would you tell us for the record what your occupation is? A. My occupation is attorney.

Q. And how do you—where do you presently practice? A. Well, presently I am the elected county attorney in Rockingham County, and have been since January 1st of this year.

Q. Now, in April, May and June of 1983 how did you —what was your practice? A. I was in the private practice of law in Exeter, New Hampshire, in a firm named Shaw and Woods located on 81 Water Street.

Q. What was the nature of your practice in 1983 in terms of specialty, if you will? A. Well, it was a general practice, but I would estimate that approximately 50 percent or more than 50 percent of my time was spent in criminal defense matters.

* * *

[8] Q. Do you have a recollection as to when the probable cause hearing was scheduled? A. In excess of a month thereafter.

Q. So it was more than a month before probable cause? A. Yes.

Q. Okay. Based—I take it you took a look at the complaint in conjunction with preparing to represent Mr. Rumery. A. I believe so, yes.

Q. And did you conduct any kind of an investigation into the basis for the complaint? A. Well, I suppose an investigation to some extent. Not a very extensive investigation.

I had a discussion with Mr. Rumery as to his understanding of the basis of the complaint, had an opportunity to read some newspaper articles which were further indicative. I did not contact Mary Deary.

I made an attempt to contact the police department, and in fact filed a motion for discovery. They were uncooperative and objected to, in writing to providing any—my recollection is—the file does not seem to have that motion in it, but my recollection was there was a written motion for discovery which was filed and there was a written [9] objection.

Q. Now, at some point you came to some understanding based on this background investigation, if you will, on your activities with regard to the basis for the complaint and the nature of the complaint; is that correct? A. Yes.

Q. And was it your intention to go through the probable cause hearing? Had you made that determination? A. I don't know whether I had actually made that determination or not. I think that in all probability if there had been a probable cause hearing it would have been my intention to go through it.

Q. Did you feel on the basis of what you saw and what you knew in May of 1983 that there was probable cause for bringing the complaint? A. Isn't that asking me to make a legal determination? An opinion?

Q. I suppose it may be. Let me ask you this. A. Can I rephrase your question and try to answer it?

Q. Sure. A. If the question were based upon that initial investigation did I think there was sufficient evidence for a district court justice to find probable cause, the answer would be yes.

[10] Q. Fine. Now, after meeting with Mr. Rumery, who did you first speak to relative to this matter from the State's point of view? A. The police chief of the Town of Newton.

Q. So you did speak to the chief? A. Yes.

Q. And subsequently did you deal with the chief relative to resolving the criminal matter? A. No.

Q. Who did you deal with? A. The Assistant County Attorney, Brian Graf.

Q. Now he was — Rockingham County; is that right? A. Yes.

Q. Now, why did you call the assistant county attorney if in fact there had not yet been an indictment? A. Basically based upon my knowledge of how the criminal justice system works in Rockingham County, which is to the effect that normally when the police arrest an individual for an alleged felony they immediately submit written reports of same to the county attorney's office so that the case can be prepared for Grand Jury.

Therefore, the Rockingham County Attorney's Office becomes aware of possible felony indictments very quickly.

[11] Since I had found the chief in Newton to be uncooperative based upon my telephone conversation with him, I thought it best to immediately go to where I thought the case would ultimately end up. Also based upon my assumption that if they did have a probable cause hearing a district court justice would find probable cause.

Q. So basically you were trying to short-circuit the system and get to the guy you were going to deal with in the end anyway. A. Yes.

Q. Now, let me back up again and ask you something relative to your meeting with Mr. Rumery. At your first meeting with Mr. Rumery did he mention to you his intention or desire to dispose of this criminal case and bring civil actions immediately thereafter? Or bring it thereafter? I don't want the word immediately to— A. Before I answer that am I assured that the attorney-client privilege has been waived for the purposes of this hearing?

* * *

[12] [By Mr. Gardner]: We would on behalf of Mr. Rumery waive the attorney-client privilege for the limited purpose of this hearing.

The Court: All right. Thank you.

Q. With that, can you tell me now whether Mr. Rumery at your first meeting with him mentioned his intention to pursue a civil action once the criminal matters were disposed of? A. I don't know as to whether or not I would go so far as to say that he mentioned an intention to pursue a civil action, but I can state that he was aware of the possibility of a civil action and that he mentioned the possibility of a civil action.

Q. Now, subsequently and on your first contact with Brian Graf is it not true that—well, let me stop there and ask you whether in fact you initiated that contact. A. I did.

* * *

[13] Q. When you first called County Attorney Graf what did you tell him? A. I'm not sure whether I called him or visited him in person. I think that I went into his offices in person.

Q. All right. And on that first meeting what did you say to him relative to this case? A. I believe I suggested to him that the State nol-pros the criminal charges against Mr. Rumery immediately and told him—I think that what I said is, "You had better nol-pros these charges, because we're going to win them and after that we're going to sue."

Q. And by that, by stating, "We're going to sue," you meant bring civil actions; is that correct? A. Yes.

Q. Now, at some point in your conversations with County Attorney Graf did the question of a covenant not to sue in return for dismissal of the prosecution [14] come up? A. Yes.

Q. And am I correct in understanding that you don't recall who first raised that question? A. I believe Mr. Graf did, but I can't say it with surety, so I think it's safe to say I don't have complete recollection.

* * *

Q. Let me ask you this. Which came first, your statement to Brian Graf that he'd better drop the case because if he doesn't your client was going to sue, or the [15] mention of the covenant not to sue? A. My statement came first.

Q. So you first, on behalf of your client, suggested there would be civil proceedings and thereafter the possibility of a covenant not to sue was raised. A. Yes.

* * *

[18] Q. All right. At some point, however, you did meet with Mr. Rumery, am I correct, and discussed with him the advisability of signing a covenant not to sue. A. Yes.

Q. And did you recommend to him that he sign one? A. Yes.

Q. And this discussion with Mr. Rumery, where did it take place? A. At my office.

Q. And was it prearranged that he was going to come in to discuss that specific matter? A. Yes.

Q. Why is it you didn't just discuss it with him over the phone? A. The reason I didn't discuss it with him over the

phone is because Mr. Rumery was emotionally distraught throughout this whole matter. I felt personally that he was not taking the criminal matter—well, if I can strike that. I don't want to say he wasn't taking it serious enough.

I personally thought that too much of Mr. Rumery's attention was directed to the possibility of a civil action rather than what I considered to be the immediate need, which was a resolution of the criminal [19] matter, and I felt that if I had merely spoken briefly to Mr. Rumery over the phone that he would have rejected the State's offer.

I intended to recommend it, and I felt that the possibility of Mr. Rumery being amenable to that recommendation would be greater if he had an opportunity to reflect upon it at some time with me so that we could sort of walk through the different possibilities that existed.

Q. And so as I understand it you met at your office. A. Yes.

Q. And the purpose of the meeting was to discuss the covenant not to sue. A. Yes.

Q. And was the covenant not to sue drafted by the time you met with Mr. Rumery? A. Yes.

Q. Who drafted it? A. I did.

Q. Had you presented that covenant to County Attorney Graf prior to meeting with Mr. Rumery? A. Yes.

Q. He had reviewed it in form, if you will? A. Yes.

Q. How long did your meeting with Mr. Rumery at your [20] office over the covenant not to sue take? A. My recollection is that it was less than an hour, but more than half an hour.

Q. Were you alone during that meeting? A. Yes.

* * *

Q. Did you discuss with him the pros and cons of signing the covenant? A. I think so.

MR. BAUER: I'm going to object, It's vague. I'm not clear on what pros and cons are, and I'm going to have to object on vagueness.

THE COURT: Why don't you just ask him what they discussed.

Q. What did you discuss during this half-hour to one-hour meeting from top to bottom? A. I'm tempted to say the pros and cons of signing the covenant.

[21] Q. I don't want to lead you. A. We discussed in detail the criminal justice system and my attitude towards it. And we discussed in less detail, substantially less detail, the potential civil actions which Mr. Rumery might have. And we discussed a balance between the two.

Q. Did you discuss what effect the signing of the covenant would have on the potential civil action? A. Yes.

Q. And what did you discuss in that regard? A. I told Mr. Rumery, whether it be true or not, I told Mr. Rumery that should he sign the covenant not to sue he would be foregoing all civil actions.

* * *

[24] BY MR. GARDNER: At the close of your meeting had you answered all of Mr. Rumery's stated questions regarding this matter? A. I think so.

Q. And what was his conclusion at the close of your meeting relative to whether he would sign the covenant or not? A. He made no conclusion. He wanted to think about it further.

* * *

[25] Q. Did he state whether he had continuing concerns about signing it? A. Yes.

Q. And what concerns did he express? A. Mr. Rumery felt that he had been wronged by the criminal justice system and he wished redress from the criminal justice system. And he was reluctant to have criminal charges dropped in exchange for surrendering his possibility of redress from the system which he felt had wronged him.

Q. When he left your office on the day of that meeting do you have an opinion with regard to whether he was well-informed regarding the effect that signing the covenant would have on the possibility of his bringing any type of a civil claim?

* * *

A. My opinion was Mr. Rumery knew, had a clear [26] understanding of the different options that were open to him at that time.

Q. Now I guess my question was, was he well-informed or do you have an opinion with regard to whether he was well-informed with regard to the effect that signing the covenant would have on the possibility of his bringing any type of a civil claim? A. Yes, I have an opinion.

Q. And what's your opinion with regard to that? A. I think that Mr. Rumery was under the impression that should he sign the covenant not to sue that he had no civil claim thereafter.

Q. Did you advise him whether in your opinion the covenant not to sue would be binding? A. I probably did not use the term binding in explaining to Mr. Rumery what I thought the effect of the covenant not to sue would be.

Q. Did you explain to him what you thought the effect of signing the covenant not to sue would be? A. Yes, yes.

Q. And what did you tell him? A. I told him—I think that what I told him is what resulted in his having the opinion which you previously asked; and that is, that should he sign it there would be no possibility of a criminal action. Excuse me, [27] of a civil action.

Q. Did you put any pressure on him to sign it? A. That's a question which I suppose an absolutely honest answer would be yes. Simply by virtue of making a recommendation, I think that that has to some extent a coercive effect upon someone who's not familiar with the criminal justice system.

So to the extent I made a recommendation and supported that recommendation I think that that would have the effect of putting some pressure—

Q. Other than to recommend it and supporting the recommendation, did you coerce him in any way? A. No.

Q. Did you pressure him in any way? A. Well, with the exception of those two facts.

Q. Right. A. No, I didn't pressure him.

Q. When he suggested that he wanted to think about it did you try to discourage him from doing that? A. (Brief pause.) I don't think so.

Q. Now, after he left your office when was the next time you talked to him? A. My best recollection it was about three days thereafter.

Q. And how did that conversation come about? [28] A. I called Mr. Rumery.

Q. And what was the purpose of your call? A. I wanted to ask him whether or not he'd had an opportunity to make a decision on whether or not to sign the covenant not to sue.

Q. And what did he advise you relative to his decision? A. I don't remember whether he advised me about his decision at that time or he said that he would call me back. So I'm not sure whether he spoke to me at that time or whether there was a subsequent telephone conversation approximately one day thereafter.

Q. When in fact he advised you of his decision what did he tell you about his decision? A. He told me that he had decided to sign it.

Q. And this was done over the phone. I mean, he told you over the phone he had decided to sign it? A. Yes.

Q. And did you make arrangements to have him come in and sign it? A. Yes.

Q. And did he sign it at your office? A. Yes.

Q. And did you witness his signature? A. Yes.

Q. And you acknowledged that it was his free and [29] knowing act? A. Yes.

* * *

Q. When he left your office on the day of your meeting did he take a copy of the covenant with him? A. I really don't recall these, you know, details like that. I would be very surprised if he was not provided with one, but I don't recall. I mean, that would be my normal practice to do so.

Q. In any event, did you have any doubt that he had an opportunity to read it and read it carefully before hm signed it? A. Oh, no. I am surm he must have taken a copy of it with him after the first conversation.

Whether or not he took a copy of the signed one I don't recall. Again, probably, because my practice is to spin out copies as if they're—

Q. Paper. A. Paper, yeah. Good choice of words. But I know he had a[t] least a copy of the document.

Q. All right. I guess what I'm trying to establish is whether or not—and I think you've already answered this—but whether or not when he left your office [30] after that first face-to-face meeting he left with a copy of the proposed covenant not to sue. A. To the best of my recollection he did.

Q. All right. A. It wouldn't have made sense for him to go and spend three days thinking about it unless he had the document to refer to.

Q. Let me show you a copy of the covenant not to sue, which was marked as Exhibit 1 for identification in your deposition. A. Yes.

Q. Is that in fact the covenant not to sue that you drafted? A. Yes.

MR. GARDNER: I'd offer it, your Honor.

MR. BAUER: No objection.

THE CLERK: Document is entered as Plaintiff's Exhibit 1. [Changed to Def. A at 33.]

Q. Would you take a look at that and tell me what the document—who the document identifies or what parties the document identifies as people that Mr. Rumery is covenanting with or entities that he's covenanting with? A. Mary A. Deary, the police department of the Town of Newton and the Town of Newton.

[31] Q. Does it make any mention of their legal representatives, heirs, assigns and everybody else? A. No.

Q. There's no clause in there that says he's covenanting with all these other folks? A. Oh, excuse me, yes. "This covenant shall inure to the benefit of the covenantees and their heirs, assigns, successors and legal representatives."

Q. Did you have an understanding at the time that you drafted that document with regard to who the legal representatives of the Town of Newton were? A. I suppose I had an understanding, but—

Q. What was your understanding? A. My understanding was that I put everybody in here as a covenantee that Attorney Brian Graf requested.

Q. And that's the only reason why they appear there? A. Basically, yes.

Q. Do you know why Mary Deary was listed as a covenantee? A. She was listed at the request of Attorney Brian Graf.

* * *

[36] Q. As a county attorney, do you feel it's important [37] to protect victims of sexual assault in order to preserve their testimony in the criminal case? A. I suppose that I wouldn't have to be a county attorney to respond yes to that question.

Q. That's why I asked it that way. Did you ever read Chief Barrett's report regarding the alleged telephone call received by—or the alleged telephone conversation between Mr. Rumery and Mary Deary? A. I don't think I ever did, no.

Q. Do you have any understanding regarding what was alleged, what it was alleged that Mr. Rumery had said to Mary Deary? A. Yes, I did then. I don't now.

Q. You don't have any recollection? A. No.

* * *

[39] *Cross-Examination*

(Questions by Mr. Bauer)

XQ. Mr. Woods, is it fair to say that a substantial amount of your practice back in 1983 was with regard to criminal defense work? A. Yes, sir.

XQ. And back in April, May and June of 1983 had you ever brought a federal complaint on behalf of a plaintiff? A. No.

XQ. Had you ever brought a 1983 action on behalf of a [40] plaintiff, either in federal or state court? A. No.

* * *

XQ. Mr. Woods, is it fair to say that 95 percent of your attention when representing Mr. Rumery was directed at the criminal defense aspect of the charge? A. Yes.

XQ. And that you were not concerned or you had very little concern for any potential civil matters. A. Well, yes. And that's because of my assumption that any civil action would basically be contingent upon a [41] successful outcome of the criminal matter.

XQ. Successful by way of a not guilty verdict? A. Yes.

XQ. Or by way of a nol-pros? A. One or the other.

XQ. And therefore your attention was to the criminal and not to the civil matter. A. Yes.

XQ. Now, when you first contacted Chief Barrett had you ever made any indication to him about a potential civil suit? A. No.

XQ. Do you know whether Attorney Graf ever talked to Chief Barrett about a potential civil suit? A. I have no knowledge.

XQ. And my understanding of your direct testimony is that you were not a hundred percent sure as to who brought up the issue of the covenant, but is it fair to say that it's more probable than not that Attorney Graf brought up the issue of the release rather than you initially bringing it up?

* * *

[42] A. Well, yes. In fact I would like to go perhaps one small step further than that and say I think he brought it up. I just don't recall. So it could have been me, but I think he did.

XQ. Fine. Now, in your dealings with Attorney Graf was it your understanding that the State would not nol-pros without the covenant not to sue? A. Yes.

XQ. If Mr. Rumery refused to sign the covenant would the State have continued in the criminal prosecution of Mr. Rumery? [43] A. Yes.

MR. GARDNER: Objection, your Honor. He can't know the answer to that question.

THE COURT: Well, why don't you ask him directly what conversation he had with Graf.

XQ. Did Mr. Graf, Attorney Graf, indicate to you that the State would continue with its criminal prosecution if Mr. Rumery did not sign the release? A. Yes, he did, but I'd like to explain the answer.

XQ. Sure. A. I don't think at any time Mr. Graf indicated that if Mr. Rumery didn't sign the release that they were going to have a probable cause hearing, an indictment, and proceed to trial. He just indicated that the criminal process would continue.

Whether it could have been, you know, interrupted at any point thereafter, I mean, there was no indication that it was—that Mr. Graf was therefore going to, you know, push this as far and as hard as he could.

* * *

[44] XQ. I'm going to show you a copy of a letter dated June 8th, 1983, and ask you whether you can identify that document. A. Yes. This is a copy of a letter which I addressed to the Clerk of the Plaistow District Court indicating that the State was nol-prossing the charge against Mr. Rumery and for that reason neither Mr. Rumery nor myself would be present for the probable cause hearing.

The reason I sent this letter is the matter was still technically in the district court. My negotiations were with Brian Graf in the County Attorney's Office.

I was concerned that the County Attorney's Office might not communicate to the district court the status of the case, so I did it myself so that the failure of Mr. Rumery and myself to appear on June 14th would not result in another warrant.

XQ. So on June 14th there was a probable cause hearing for Mr. Rumery. A. Yes.

XQ. And— A. And this letter is dated June 8th. And it no doubt was dictated by me. Whether it went out June 8th, I don't know. It could have gone out the day thereafter. [45] But it would have been dictated by me on the same day that Mr. Rumery signed the covenant not to sue.

XQ. So on June 8th it's more likely than not that Mr. Rumery signed the covenant and on June 14th he was facing the probable cause hearing. A. Yes.

MR. BAUER: Your Honor, I would ask that this June 8th, 1983 letter be marked as Plaintiff's 1.

MR. GARDNER: No objection, your Honor.

THE CLERK: The June 8, 1983 letter is marked and received as Plaintiff's 1.

XQ. Now, Mr. Woods, you have any understanding as to the reason the State wanted the release signed? Do you have any understanding? A. Yes.

XQ. And how did you obtain that understanding? Did you talk with Attorney Graf? A. No.

XQ. Do you know the reason for the release being a condition of the nol-pros? A. No. I have an understanding based upon the weight of the circumstances.

XQ. And what was your understanding?

* * *

[46] * * * My understanding was after I had made this threat of a civil action the State was not willing to enter the nol-pros—to enter a nol-pros at that time without a release from Mr. Rumery of those threatened civil actions.

XQ. And that was to protect the police department? A. To protect the police department and the witness.

* * *

[50] XQ. With regard to your dealings with Mr. Rumery, you never discussed the type of suit that Mr. Rumery may have against any individuals; did you? A. No.

XQ. You never discussed with Mr. Rumery the type of rights that he may have against individuals; did you? A. No.

XQ. You do not recall, do you, ever discussing any 1983 actions that Mr. Rumery might have or 1985 actions that Mr. Rumery might have against any individuals; did you? A. I don't recall. I may have mentioned a number of common law tort theories. I may have mentioned 1983. There was some conversation about civil actions. I certainly didn't go into detail concerning any of them about what the, what the elements of each action would be.

And so to the extent that there was any conversation between myself and Mr. Rumery about civil actions, I may have thrown out some words but it [51] was more—I am sure that it was more than an understanding that if a wrong was committed there would be some civil redress.

And the particular kind of civil redress was not of interest to me at that time, because I assumed that we would need to resolve the criminal matter successfully prior to seriously considering the civil action.

XQ. All right. So then you never really went over any details of any federal rights, or for that matter state rights, that Mr. Rumery may have had. A. Right, I did not.

XQ. And in fact your overriding concern, as a criminal defense lawyer, was to in one way or another clear Mr. Rumery of the criminal charge; isn't that correct? A. Yes.

XQ. And you had very little, if any, concern about potential civil suits. A. True.

XQ. Now, in your direct testimony you indicated that Mr. Rumery was in an emotional state. He was very distraught; wasn't he? A. Yes.

XQ. And he was very excitable throughout this whole [52] incident; wasn't he? A. Yes.

XQ. Do you know whether Mr. Rumery has ever been introduced to the criminal justice system before this incident? A. My understanding was that he had not.

XQ. Do you know what Mr. Rumery did for a living when he was arrested? A. My understanding was that he worked for the John Hancock Insurance Company. I think as an insurance salesman, but I'm not sure. My recollection as to exactly what his capacity for John Hancock was is sketchy.

XQ. Do you know whether he had any significant motor vehicle record? Do you have any information about that at all? A. I had, I had no information, but—well, I don't even—I certainly had no information about a motor vehicle record.

My recollection was that Mr. Rumery had never been arrested before.

XQ. And he was beside himself, wasn't he, throughout this whole incident? A. Yes.

XQ. And he was beside himself in this emotional state for [53] a number of reasons, one of which were certain newspaper reports that were published; isn't that correct? A. Yes.

XQ. And would you explain the impact, or what those newspaper reports were and the impact that you saw on Mr. Rumery. A. The newspaper reports were news articles in I believe four different newspapers, although each one was slightly different, which contained statements by the chief of police of Newton relative to the arrest of Mr. Rumery, which were I would have to state virtually condemnatory in nature.

XQ. Prior to a probable cause hearing. A. Yes.

XQ. And what effect, if any, did you observe those newspaper accounts having on Mr. Rumery's emotional state and mental state? A. Well, to the extent he was distraught after the arrest, these exacerbated his mental state.

He was a very difficult client to deal with, because he was—I don't want to say wild in a sort of a violent sense, but—I mean he was so excited about this, these, this arrest and these newspaper reports that it was hard to calm him down so that you could [54] talk to him about the details of the criminal justice system or the details of civil actions.

XQ. Was it confusing to you to deal with him in order to keep him on track in your talks with him? A. I don't think he was confusing to me. I mean, it was something that you really had to work at to keep him on track.

XQ. Now, in your direct testimony you indicated that you thought that probable cause would have been found by the district court. Would you explain your answer? A. I certainly don't want to cast any aspersions on the criminal justice system in the State of New Hampshire, but it has been my experience that the district court's really not designed for sophisticated fact-finding and that what amounts to probable cause is really possible cause in the district court.

If they find that there's a possibility that the named defendant committed an offense they will find probable cause, because the district justices are well aware of the fact that regardless of their finding that the case will be reviewed by the respective county attorneys around the state and that regardless of their finding the case will still be submitted to a Grand Jury for their finding.

So in fact there are very, very few probable [55] cause hearings anymore, because they're all scheduled after the next sitting of the Grand Jury so that the Grand Jury can take over that process. So it's kind of an additional process which is rarely used, and they know that there's going to be a Grand Jury investigation anyway, so the tendency of the district court justices is to always find probable cause.

XQ. Regardless of whether the evidence measures up to--measures up to textbook probable cause or not? A. That is my personal opinion.

XQ. And was that opinion given to Mr. Rumery? A. Yes.

* * *

[57] *Cross-Examination*

(Questions by Mr. Yakovakis)

XQ. Mr. Woods, I just want to clarify a few things. You indicated that Mr. Graf only indicated to you through your discussions that if the covenant had not been executed that the criminal justice system would merely take its ordinary course; is that correct? A. Yes.

XQ. He never indicated to you or advised you or said to you that if this covenant is not signed we're going to proceed in some, some way other than just a normal processing of the criminal action. [58] A. No.

XQ. And he never in any way put any pressure of any type on you to have that covenant not to sue executed by your client. A. No.

XQ. You, at the time that that covenant was signed you and your client had the option of going forward with the probable cause hearing and the normal course of a criminal hearing; is that correct? A. Yes.

* * *

[67] BERNARD E. RUMERY, JR.

having been duly sworn, testified as follows:

* * *

[68] *Direct Examination*

(Questions by Mr. Anderson)

Q. Mr. Rumery, can you state your occupation, please? A. I am a marketing representative for the John Hancock Companies.

Q. And where is your place of business? A. In Haverhill, Massachusetts.

Q. And how long have you lived in New Hampshire? A. All my life. Fifty-five years.

Q. And prior to May 11th, 1983 did you know Mary Deary? A. Yes, I did.

Q. And in what connection? How did you happen to know her? A. Her husband was killed in an accident and I took care of the death claim. But I also knew her as a friend before that through her husband.

Q. And about how long would you say you had known her prior to 1983? A. I'd say four or five years.

Q. And did you also know a man by the name of David Champay? A. Yes, I did.

[69] Q. And in what connection did you know him? A. I used to go hunting with him. Deer hunting.

Q. Did Mary Deary know David Champay? A. Yes, she did.

Q. Did they live in proximity to each other? A. I'd say around a mile apart.

Q. And they were to your knowledge social acquaintances? A. That's correct.

Q. Now, did you have occasion to call Mary Deary sometime in the spring of 1983? A. Yes, I did.

Q. And what was the occasion of your calling? A. I saw in the paper where David Champay had been arrested for, I think it's felonious sexual assault or something like that. It may be rape, whatever. And knowing Mary, I called her to find out who the woman, the victim was.

Q. And what did she tell you? A. At first she was very indignant to me and I couldn't understand what it was all about. I was just asking her a question. Well, finally she told me she was the victim.

Q. And was that your first knowledge that she was the victim in the case? A. That's correct.

[70] Q. Before calling Mary Deary had you had any conversation with David Champay about calling Mary Deary? A. No, I haven't seen Dave since last November.

Q. Well, as of the time—you mean the fall of '82? A. That's right.

Q. After you found out that she was the victim, did you have any further conversation with her at that time? A. Not too much. There wasn't too much. I can't—

Q. When did that conversation take place? A. Where did it take place?

Q. When, about. A. I'd say around, guessing around March, the first part of March, somewhere along in that line.

Q. Would it have been some time after the indictment came out in the paper? A. Oh, yes, it was, because I didn't know anything about it until it came out in the paper.

Q. From the time of the telephone conversation how long a time elapsed approximately until you had another telephone conversation with her? A. Around two months.

Q. And in the interim did you see or talk with her? A. No, I didn't.

Q. And how did this next telephone conversation occur? [71] Who called whom? A. She called me at my office.

Q. And about when was that? A. I think it was May 11th. Could have been May 10th. 10th or 11th.

Q. And she called you you say. A. That's correct.

Q. At your office. A. Right.

Q. And what was the reason given by her for the call? A. She wanted to know whether I knew of Brenda George.

Q. And why did she want to know that? A. Brenda George was going to marry her son and I was a friend of the Georges.

Q. And why did she— A. And she wanted to know what type of a girl she was.

Q. After that conversation on that subject was any other subject brought up? A. Yes. She asked me if I knew that Dave Champay's wife had left him and I says no, I didn't.

Q. What else did she say? A. And she says, she said, "Well, I didn't want"—she says, "David is a victim. I like David and he's the victim."

She says, "I don't—I don't understand," she [72] says. "He has to give her—which means his wife, Diane—money.

Her boyfriend's giving her money. The only money I'm getting is from John Hancock," which means it was an investment she got I sold her.

And she says, "He is the victim." She says, "I feel sorry for him." But she says—

MR. YAKOVAKIS: Your Honor, this is all hearsay and I object to it.

MR. ANDERSON: I'm not offering it for the truth of the matter, your Honor. I'm offering it for the state of mind of my client—

THE COURT: I'll let it in on that basis.

A. And so she said she didn't know—she says, "I don't know what to do. I don't want to hurt him." She says, "I don't know what to do."

So I said, "Well, if you feel that way towards him," I says, "then you can—it's possible to, to end this case." I didn't say end the case. I says, "It's possible to stop the case," or whatever. And she says, "Well, I was told I couldn't."

And I says, "Well, you can call the county attorney if you want and talk to them about it."

But she kept saying she was—she kept saying—well, she says, "I'm not a bad person, I'm not vindictive."

[73] And I says, "Well, that's up to you." I said, "That's all I can say."

And I says,—she kept rambling on about different things and finally I says, "Look, Mary, I have to leave. I have an appointment. If you want to call me I'll be in the office 11 o'clock tomorrow morning."

And that's all there was to the telephone conversation.

Q. At some time after that telephone conversation were you arrested? A. The next day.

Q. And who arrested you? A. Chief David Barrett.

Q. And was anybody else with him besides— A. Officer Farrell.

Q. And explain to the Court the circumstances under which you were arrested. Where were you? A. I was at home.

Q. And did you have any forewarning of this arrest? A. Yes. Yes, I did.

Well, not for the arrest. I didn't know what it was all about. The police come to my house while—when I was gone, talked to my wife. And they told my wife to call Rockingham County dispatch office or [74] call them when I got home.

So I did. And I told them—and I asked them what they wanted. They said, "We want you down here right away."

I said, "No, no. If you want to see me, you know where I live." And so—

Q. Then what happened? After that what happened? A. So they arrived around 10:30 at night. And they walked in and I said, "You must be the new chief of police in Newton." I don't know whether he even answered me or not.

Q. What did he say? A. And I says, "Well, what can I do for you?" And in the meantime I says, "Have a seat," and he says, "I'd rather stand."

And I says—he says, "Do you know a Mary Deary?" And I says, "Yes."

And then he started to—he proceeded to read my rights to me.

Q. And then what happened? A. And then he just said, "You are being arrested for a Class B felony," under certain RSA number, tampering with a witness, which is a—which is a felony, Class B felony.

And I said, "What's—I says, "What am I being [75] arrested for?"

And he says, "You threatened her life," and harassed somebody or something.

Q. At that point in time did you know who he was talking about? A. No, I didn't.

Q. Did he tell you anything other than that? A. No.

Q. Then what happened? A. About that time I called my wife. She was setting in the other room and I called my wife and I told her. I says, "Come out here," and she overheard the coversation.

She said, "Don't tell them anything and don't say anything," or something to that effect.

And I says, "Well, I want Danny Lenehan. I want the State in on this."

Q. Who is Danny Lenehan? A. He is a State Trooper that lived down the street from me.

Q. At this point in time did you have any prior criminal record of any kind? A. No, I didn't.

Q. Motor vehicle record? A. I never even got a parking ticket in my life.

[76] Q. So was this your first contact with the criminal system? A. Yes, it was.

Q. What did they do next after that? A. He took me to—he handcuffed me and—oh, first of all, then I called Danny Lenehan and Danny told me to do what they required and to get myself a lawyer.

So they handcuffed me and took me out into the cruiser, took me to Brentwood.

Q. How did you get—find your way to Brentwood? A. I showed them how to get there.

Q. They didn't know how to get there? A. No, they didn't.

Q. Anyway, did they interrogate you at all and ask you questions about the crime or anything like that? A. They never mentioned a thing.

Q. When they got to Brentwood what did they do? A. Well, I went in, set down on a bench handcuffed and the jailer—I'm setting there for a few minutes and the jailer comes up and grabs the keys off of Barrett's person and he says, "Give me those keys," and he come over and he released me.

Q. Is this anybody you knew? A. The jailer? No, no. In fact I can't even remember [77] his name now.

Q. Then what happened? A. Then Barrett come up and shook his finger at me and he says, "I don't want you near her house and harassing her and threatening her," and all this bit. He rambled on and on about it screaming at me. And then he left.

Q. What did you do after that? A. Went through the procedure. I was mug shot, I had my mug shots, my fingerprints, and proceeded through the bail, whatever bail, I mean whatever I had to do. They had to call a bailiff. I bailed myself out.

Q. And how did you get back from Brentwood— A. My wife, she came and got me.

Q. Is that the same night? A. Same night.

Q. Now, have you had an opportunity to review the police report which has been marked as an exhibit? I will represent to you it has been marked as an exhibit in this case. A. Yes, I have.

Q. And in it there are certain statements which are related as having been made by you in the course of your telephone conversation with Mary Deary; is [78] that correct? A. That is correct.

Q. And I'm going to call your attention to page two of the police report where it's in single space and ask you if you said that, made the statement that David Champay would have the best lawyer that money could buy. A. I see this. I see it here, right.

Q. Did you make that statement to Mary Deary? A. I did not.

Q. What about that when the case gets to court the lawyer's going to nail her, Mary, to the wall. A. Absolutely not.

Q. And that her reputation will be ruined. A. No.

Q. And that you referred to Officer Kathleen Marino as Officer Maglino. A. No, I didn't.

Q. Did you even know of Officer Marino? A. No, I didn't know her.

Q. At that time. A. That's right.

Q. That the information would make her look like a fool in court. Did you say that? A. No, I didn't.

[79] Q. That Officer Marino's reputation would be ruined. A. No.

Q. That the writer's name would be mud in the Town of Newton. A. No, I didn't.

Q. Presumably referring to Officer Marino.

That if Mary Deary testified she and her daughter would end up like the two women in Brockton.

Did you make any such statement? A. I never knew anything about that at all. Nothing whatsoever. I never even knew that existed.

MR. ANDERSON: And for the Court's information, there is an apparent reference to a double shooting last week where two women were shot dead and the alleged killer was the father of the baby of one of them. And he took the baby, disappeared and is still at large.

Q. You did not know about that— A. No, I didn't.

Q. —at the time you were arrested? A. Nothing.

Q. Did you state that Deary had better not go forward with the case; that he, someone had gotten Ron Silver off on his rape case. Did you make that statement? [80] A. I did not.

Q. And that he could do the same in this case? A. That is false.

Q. And did you give her an ultimatum until May 12th, 1983 at 11 o'clock to think it over? A. No, I told her if she wanted to call me that she could call me at 11 o'clock. I'd be in the office at 11 o'clock the next morning. But I didn't give her any ultimatum or anything like that.

Q. Now, did you retain a lawyer after this? A. Yes, I did.

Q. And who did you go to first? A. To Robert Shaw.

Q. And why did you go see him? A. Because I had dealings with him before.

Q. And what did he do when you talked with him? A. He transferred me over to Stephen Woods.

Q. And did you have a conference with Mr. Woods? A. That's correct.

Q. And where was the conference held? A. In his office.

Q. And about approximately when would you say that this first meeting took place? A. I'd say the 13th of May.

Q. And did you tell him what had happened? [81] A. I did.

Q. And give him a statement? A. I did.

Q. And what did he say to you? A. He said he was going to make me ten foot tall.

Q. What did you understand him to mean by that? A. Well, in other words, he says, "I can"—he says, "Honestly and truthfully," he says, "I have defended a lot of people and usually they've been down the road before they come to me. But," he says, "in this case," he says, "I believe you a hundred percent. I think you are the only innocent person that I've ever defended."

Q. Then after that initial conference when was the next time that you talked with him? A. I can't remember. I called him a couple times to find out how it was coming. How the case was—whether he had heard anything or what was progressing.

Q. When was the first time that you heard from him on the subject of this release, of the covenant? A. Well, it was on a Friday about two weeks later.

Q. About what time of the day? A. Four o'clock in the afternoon.

Q. And what did he tell you? A. He said he could get me off. It was the first time [82] I'd heard about a covenant not to sue. I didn't know such a thing existed. And he called me at four o'clock and said I would have to sign this covenant and it would be all over.

Q. How much time did he give you when he initially called you? A. One hour.

Q. So you were supposed to call him back within an hour? A. Yes.

Q. And what did you say? A. I said "I can't do that. I just can't do that. I've got to have more time to think it over."

Q. What did he tell you would happen if you didn't sign it? A. In that conversation he didn't say. He might have, but—we would have to proceed and all this but—

Q. Did you have a conversation with him the next day? A. The next day.

Q. That was a Saturday? A. That's right. That's correct.

Q. Did you go into his office or was it on the telephone? A. No, this was on the telephone too.

Q. At that time what did he say? A. We went all over it again and everything and he told me that—my wife was on the other extension, too, [83] by the way. And he told me that he would advise me to do it.

And I says, "Well, what are my chances, you know, of going through with it?"

And he says, "Well," he says, "I can't tell you, but I can say that you wouldn't be the first innocent person who ever went to jail."

Q. And what effect did that have on your state of mind? A. A lot, believe me.

Q. And at some point did you sign this release? A. Yes, the next Monday. Oh, yes, another thing too. He said that if I didn't sign the covenant not to sue I would be indicted in the Grand Jury Monday morning.

Q. And what did you say to that? A. I didn't say anything. I just thought.

Q. And did you in fact go into his office on Monday? A. I did.

Q. And did you in fact sign that covenant not to sue? A. I did.

Q. And why did you sign it? A. Because I was afraid of going to jail.

Q. Did you feel at the time that you signed this covenant that you were guilty of the crime with which you had been charged?

[84] MR. YAKOVAKIS: Note my objection.

A. No way.

THE COURT: I'm going to allow him to answer. I'll note your objection.

Q. You may answer. A. No way.

* * *

[85] *Cross-Examination*

(Questions by Mr. Yakovakis)

XQ. Mr. Rumery, how old are you, sir? A. I'm 55 years old.

XQ. And how long have you been in the insurance business? A. Be six years April 2nd. Six years April 2nd.

XQ. Now when you—what do you do; sell insurance for Metropolitan? A. John Hancock.

XQ. John Hancock? A. Right. Insurance and investment vehicles.

XQ. And investments? What do you mean by those? A. Annuities, mutual funds.

XQ. And your office is in Haverhill, Massachusetts? A. 350 Main Street. 350 Main Street.

XQ. What did you do prior to being in the insurance business? A. I owned and operated a restaurant.

XQ. Where did you own and operate that? A. On Route 125, Plaistow, New Hampshire.

XQ. And how long did you do that, sir? A. Eleven years.

[86] XQ. Did you have any training in your insurance product before you went into the business of selling insurance? A. I had to pass the state examinations.

XQ. You did. Did you take some courses with the John Hancock? A. Well, at first. The courses didn't come at

all—I didn't—I had to pass the regular life and accident health that I self-studied.

Then I got with the National Association of Security Dealers. Then I had to go to school to study, because it was federal and I was handling securities and I had to do it that way.

XQ. Well, during that time you had to learn your product before you could sell it; did you not? A. Correct.

XQ. In other words, if you were selling insurance you had to be able to describe and advise your clients what they were purchasing and what the product was all about. A. Exactly.

XQ. Did you know Police Chief Barrett prior to any of this, this event? Prior to being arrested? A. No I didn't.

XQ. Did you know Officer Farrell before being arrested? A. No, I didn't.

[87] XQ. Did you know Officer Marino before being arrested? A. No, I didn't.

XQ. These three officers were police officers in the Town of Newton; am I correct? A. That is correct.

XQ. And you lived in the Town of Danville? A. That is correct.

XQ. Not in the Town of Newton? A. Right.

XQ. Who was the chief of police in Danville? A. Clyde Goldthwaite.

XQ. Now, I assume also you had no contact with any of the selectmen of the Town of Newton prior to your arrest. A. That's correct.

XQ. You had no prior problems with the police in the Town of Newton prior to this arrest. A. That's correct.

XQ. You did know Mary Deary. A. I did.

XQ. In fact you were a close friend of Mary's, were you not, and her husband? A. I was, that's correct.

XQ. And you and your wife had been out to dinner with them on occasion? A. Possibly. I can't remember that. I know we've been [88] to parties together.

XQ. All right. And that was the same, was it not, with David Champay and his wife. A. No, I wasn't as close to David.

XQ. You weren't as close to David, but you had been to parties with him and his wife; had you not? A. No, I hadn't.

XQ. You hadn't? He was just a hunting associate? A. That's correct. Once a year.

XQ. That's it. Now he lived in, he lived in Newton; did he not? A. That's correct.

XQ. Am I correct that I understand that you learned about the arrest of Mr. Champay by reading it in the paper? A. That's correct.

XQ. What paper was that? A. The Haverhill Gazette.

XQ. Haverhill Gazette? Did you call Dave Champay and ask him about it at all? A. No, I didn't.

XQ. Never discussed the situation with him whatsoever? A. None whatsoever.

XQ. Just one day you happened to be calling or talking to Mary Deary about that incident? You called her you [89] said; isn't that correct? A. That's correct, right.

XQ. Because you knew that she knew David Champay. A. I never associated the two of them at that time.

XQ. Oh, I see. Well, why was it that you asked Mary about this sexual assault that had occurred? A. Because she was a friend of mine.

XQ. But you didn't know she was involved at the time. A. That's exactly correct.

XQ. You just happened to be, what, discussing that issue with her? A. No, I called her to ask her who this person was that he was being—I mean Dave was being accused of, if she knew who this person was.

XQ. I see. Why was it that you thought Mary Deary would know this? A. Well, she lives in the same town.

XQ. I see. Well, there's a lot of people that live in Newton. A. Newton is small.

XQ. But Mary, for some reason you thought Mary might know. A. That's correct.

XQ. And in fact she not only knew, but she had been the victim; is that right? [90] A. That's correct.

XQ. And she was a little upset by it? A. That's correct.

XQ. But you didn't know that when you called. A. That's correct.

XQ. Did you know Ron Silver? A. Yeah, I did.

XQ And who was Ron Silver? A. He's a good friend of mine.

XQ. What does he do? A. He's a machinist. Welder, machinist, whatever.

XQ. Where does he live? A. Brentwood.

XQ. In Brentwood? He's a close friend of yours; isn't he? A. That's correct.

XQ. Why wasn't it that you didn't call Ron Silver to find out about David Champay? Or did you call him? A. Number one, he doesn't have a telephone.

XQ. Oh. A. Number two, he wouldn't have known anyway I don't believe.

XQ. I see. Okay. So rather than call him you called, thought to call Mary.

Now, when Mary Deary called you to talk about [91] Brenda George apparently you said she raised the issue of about not wanting to hurt Mr. Champay. A. That's right.

XQ. Now Mr. Champay, mind you, he was the one that had so feloniously assaulted and raped Mary Deary; am I correct? A. That's correct.

XQ. Now, this conversation took place some time after the original one, or was it the same time that you called her to talk to her about who the victim had been. A. Two months later.

XQ. About two months later? A. Right.

XQ. And she just, she called you and just asked you—told you that she didn't want to hurt Mr. Champay.

What else did she say? What was the purpose of that call? A. She wanted to find out if I knew of Brenda George.

XQ. Who? A. Brenda George.

XQ. Okay. A. Because Brenda George, whoever Brenda George is, was supposedly going to marry her son.

XQ. Okay. So after you finished discussing that, then you got on the issue again of Mr. Champay. [92] A. Yes, she did.

XQ. She got on that issue. And you didn't want to discuss that issue at all with her? A. I went along with it.

XQ. What do you mean when you say you went along—A. I answered her. Whatever she said, I answered her.

XQ. And then you told her, well, you've had enough, you were busy, and please call me tomorrow morning; is that right? A. That's correct.

XQ. At 11 o'clock? A. I said if she wanted to she could.

XQ. Where did you want her to call you; at home or in the office? A. No, I was going to be in the office.

XQ. Saturday morning? A. Saturday morning?

XQ. What day was that? A. Oh, I don't know.

XQ. But you wanted her to call you the next morning at 11 o'clock. A. I said she could call me if she wanted to.

XQ. Apparently she never did; is that right? A. That's correct, because I was arrested that day.

XQ. Did you have any, was there any—apparently you and [93] Mary were getting along all right; weren't you? A. That's right.

XQ. You had had no problems with her of any type? A. No problems whatsoever.

XQ. Was there any reason that you know of why Mary Deary would make the statements that she made to the police? A. Absolutely not.

* * *

[95] XQ. In any case, apparently you were arrested on May 11th; was it? A. May 11th.

XQ. And you went over and you talked the situation over with Bob Shaw and—is it Bob Shaw? A. That's right. Next day.

XQ. And he referred you to Attorney Woods. And Attorney Woods represented you.

Now, are you telling us that you never heard from Attorney Wood until he called you on a Friday and said he had a covenant not to sue for you to sign? A. Am I telling you that?

XQ. Yeah. A. No.

[96] XQ. Had you been to—and talked to Attorney Woods prior to that occasion? A. I'd called him on the phone. Two or three times.

XQ. Two or three times. Had you been to his office? A. Only the first time.

XQ. Only the very first time. A. Right.

XQ. And after that you only dealt with him by telephone? A. That's correct.

XQ. Did you ever have in your possession a copy of the covenant not to sue? A. Before or after I signed it?

XQ. Before you signed it. A. No, I never did.

XQ. You never looked at it, never saw it? A. Never seen it, no way.

XQ. So you went into his office and you signed it in his office without having seen it before. A. That's correct.

XQ. So when Attorney Woods testified here in court his recollection was not correct. A. That's correct.

XQ. When you talked to Attorney Woods and he called you, Mr. Rumery, to discuss the covenant not to sue did he explain what this was to you? [97] A. Vaguely.

XQ. Tell me what he said vaguely. A. He said, I believe he said—I can't recall, but I believe he said, "I can get you off of this," or something to that effect by signing a release, which I never even heard of. "But I have to know right away, because you're going to be indicted in the Grand Jury Monday morning." So one way or the other.

XQ. You had never heard of a release? A. No.

XQ. In the insurance business you'd never heard of a release before? A. That's correct. That's the insurance business. This isn't the law.

XQ. You never heard of what a release was at all? A. A covenant not to sue? That's what it is.

XQ. Oh, I see. A. Well, that's what—

XQ. Did you read this document? A. Yes.

XQ. Covenant not to sue? A. Before I signed it I did.

XQ. Yes. Did you read it? A. I read it.

[98] XQ. Did you understand it? A. Partially.

XQ. Well, what part didn't you understand? A. I can't recall right now.

XQ. Did you discuss any portions of it with Attorney Woods? A. I don't think so.

XQ. You mean even the parts you didn't understand you didn't discuss with Attorney Woods? A. That's correct.

XQ. You had no concern over those, Mr. Rumery? A. Oh, I had concerns, but I was in a mental condition at that time, it didn't make any difference. All I knew was I was going to jail.

XQ. I see. How about Attorney Shaw was still in the same building, wasn't he, with Attorney Woods? A. Yes.

XQ. And he was a good friend of yours. A. That's right.

XQ. You could have gone upstairs and talked to Bob Shaw and said: Hey, wait a minute. You know, I'd like—would you take a look at this agreement? Should I sign this Bob, or shouldn't I? Did you do that? A. No, I didn't.

XQ. Why didn't you do that? [99] A. I don't know.

XQ. You don't know. You were told by Attorney Woods I gather that on Friday, which would have been, what, the 3rd of June if Monday's the 6th? A. I believe somewhere, probably.

XQ. You were told that on Monday the 6th you were going to be indicted if you didn't sign this covenant. A. That's correct.

XQ. Those are the words he used. A. Yes.

XQ. And did he explain to you what he meant by indictment? A. I was going to be indicted in the Grand Jury.

XQ. I see. Had you—is this the first time you had heard that? A. Yes, yes.

XQ. And this was going to be Monday, the following Monday, the 6th. A. Correct.

XQ. And he, initially when he called you at four o'clock it was late afternoon on Friday as I recall; right? A. Right.

XQ. And he said he wanted you to sign this document within an hour. A. He said he wanted an answer within an hour.

XQ. Answer within an hour. And you told him then: No way [100] I can give it to you. A. Correct.

XQ. Did you tell him: I want to see this document and read it? A. I might have. I might have.

XQ. You might have? A. I probably did. I can't—that's two years ago. I can't remember.

XQ. Oh, you can't remember? Do you remember going to his office afterwards to pick a copy up and taking it with you? A. The day I signed it.

XQ. The day you signed it. Not Friday. You didn't go by his office on Friday? A. No, no way. No.

XQ. And you didn't pick up a copy to take home to discuss and read. A. No.

XQ. You're not saying, apparently you're not saying you didn't understand the covenant; are you? You're not saying you didn't understand what was in this document when you signed it. Are you saying that? A. I might have understood most of it. I don't—at that time I just didn't—I wanted to get rid of it.

[101] Q. I see. Well, that's a different case.

Now, you say you may have understood what was in it, but you were in such a state of mind that you wanted to get rid of it regardless; is that correct? A. Correct.

XQ. That's what you're saying. A. That's right.

XQ. But that's different from not understanding what was in the document; am I right? A. I still don't understand it.

XQ. You still don't understand it? A. Right.

XQ. Well, why don't we go over it just a little bit and then you can tell me what you don't understand in this.

* * *

Do you know who covenantor and covenantee is? A. Well, I'm one of them.

XQ. Okay. Are you the covenantor? [102] A. I think so, yeah.

XQ. Okay. "Covenantor will never institute any action or suit at law or in equity against the covenantee."

Do you know what that means? A. Right.

XQ. You won't institute any suit against them? A. Right, right.

XQ. "Nor institute, prosecute or in any way aid in the institution or prosecution of any claim, demand, action or cause of action."

Do you understand what that means? A. I understand that, right.

XQ. Well, you knew, did you not, when you got through, before signing this document that you were releasing your right to sue the people named in this document through any civil action. Didn't you know that? A. The possibility I did. I don't even know. At that time I didn't know much of anything. I was in shock.

XQ. Now, this was on June 6th. This was almost a month later? A. About two weeks later I believe.

XQ. Well, you were arrested on May 11th? A. I was arrested on May 11th, but that was—the covenant was signed on when; June 6th?

XQ. June 6th. [103] A. Two, three weeks, whatever it might be.

XQ. You continued to work; did you not? A. No, I didn't.

XQ. You didn't work during that period? A. Very, very little, if anything at all. I don't think I did at all.

XQ. So when Mr. Woods had testified in this courtroom just a couple of hours ago that he explained this document to you and you understood it, that's not accurate? A. No, it isn't.

XQ. It is not accurate? A. It isn't accurate.

XQ. Is there any reason for Mr. Wood not to tell the truth as he recalled it? A. No, no. He just gave it to me and I read it and I says, "All right. I'll do it."

XQ. And that was the extent of it. A. That was the extent of it.

XQ. He never explained it to you? A. Well, he must have figured it was self-explanatory.

* * *

[104] *Cross-Examination*

(Questions by Mr. Gardner)

XQ. As I understand it you got a call from Steve Woods on Friday, June 3rd, 1983 at four o'clock. A. That is correct.

XQ. And you were at home or at work? A. At home.

XQ. He needed an answer within an hour. A. Correct.

XQ. And you told him when he called you at four that you couldn't possibly do that. A. That is correct.

XQ. That you wanted to think about it. A. Right.

XQ. You then knew, I take it, when he called you on Friday at four what the significance of the document he wanted you to sign was. A. Possibly.

XQ. Well, look. I mean, if you got to think about it you got to know what it is you're thinking about. A. It was a release he said. A release.

XQ. And you understood what that meant. A. Not really. Not really at that time. I didn't, not in that conversation.

I knew I was getting off—he said he was going [105] to get me off, that's all. I didn't know what it entailed.

XQ. And did you speak to Steve Woods again on Friday after that telephone conversation? A. Friday after the Friday he talked to me?

XQ. On Friday, June 3rd, did you talk to him on that day again? A. No.

XQ. Okay. Was it left with him that you were going to call him back at some point? A. The next day. By five o'clock Saturday.

XQ. All right. So then you called him on the next day? A. That's correct.

XQ. But you did not meet him face to face. A. That's correct.

XQ. You did not go into his office. A. No, I didn't.

XQ. And to the extent that he testified that you were in his office and had a one-half hour to one-hour conference to discuss this he is in error. A. That is correct.

XQ. You did not get a copy of the covenant to take with you to look at, think about, prior to deciding to sign it? A. I said I wasn't even there.

[106] XQ. So that to the extent he said that was the case, he was in error again. A. That's correct.

XQ. When you talked to him on the phone on Saturday did you tell him that—any time during that conversation that, yes, in fact you were willing to sign it? A. Near the end of the conversation I think I said, "I think I'll sign it."

XQ. And when did you go in to sign it? A. Monday night.

XQ. Were you indicted by the Grand Jury on Monday morning. A. No, because he said he would stop it.

* * *

[DEF. TRIAL EXHIBIT C]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

[CAPTION OMITTED]

DEPOSITION OF BRIAN ROSS GRAF

Deposition taken by agreement of counsel at the Rockingham County Administration & Justice Building, Exeter, New Hampshire, on Friday, March 22, 1985, commencing at 9:03 a.m.

* * *

[3] APPEARANCES:

For the Plaintiff:	HALL, MORSE, GALLAGHER & ANDERSON By: G. Wells Anderson, Esq. 14 Centre Street Concord, NH 03301
For the Defendants Town of Newton & Selectmen	JAMES S. YAKOVAKIS, P.A. By: James S. Yakovakis, Esq. 67 Central Street Manchester, NH 03101
For the Defendants Chief Barrett & Town of Newton	DEVINE, MILLIMET, STAHL & BRANCH, P.A. By: Donald E. Gardner, Esq. 1850 Elm Street Manchester, NH 03105

* * *

[4] BRIAN ROSS GRAF

having first been duly sworn by Mr. Yakovakis, was deposed and testified as follows:

Examination

BY MR. YAKOVAKIS:

Q. What is your name? A. Brian Ross Graf, G R A F.

Q. Where do you reside? A. Seven Wayside Drive, Exeter.

Q. And what is your occupation? A. I'm Deputy County Attorney for Rockingham County.

Q. How long have you served in that capacity? A. I have been an assistant in the Rockingham County Attorney's office for approximately four and one-half years, and I have been officially the deputy since, I think, January of 1985, but I have been unofficially the first assistant for—well, since July of 1982 I believe.

* * *

[7] Q. All right. In the course of your—in your capacity as County Attorney's office, Rockingham County, you have had dealings with the Town of Newton and its police department? A. Yes, I have.

Q. And do you know Chief Barrett of the Newton Police Department? A. Yes, I do.

Q. Do you recall being involved in a case involving Mary Derrie (ph) and a Mr. Champy? A. I believe it's Mary Deary, D E A R Y, and I believe David Champy, C H A M P Y. I do recall that case.

Q. Can you just tell me briefly what that case involved? A. It involved an allegation that David Champy had committed an aggravated felonious sexual assault on Mary Deary.

Q. What was your first connection with that case if you recall? Who brought it to your attention and under what circumstances, etc.? A. I don't remember for sure how I became [8] involved with the case in the first instance. I do recall that I discussed the case with Chief Barrett, and I believe I may have also discussed the case with Kathleen Marino, although I don't remember for sure.

* * *

Q. Did you review that case for purposes of determining whether it had merit? A. Yes, I did.

Q. And what was your opinion? A. My opinion was that the case did have merit, although it was going to be primarily a situation where the state would have to rely upon the testimony of Mary Deary, the situation where she knew David Champy in the past, and there was some physical evidence in the form of photographs that had been taken of Mary Deary which were important from my point of view in determining that that [9] particular case had merit so it should be presented to a grand jury to determine if it warranted a trial.

Q. Did that case go to a grand jury? A. Yes, it did.

Q. And did the grand jury find probable cause? A. They indicted Mr. Champy.

Q. You have to excuse me, Mr. Graf, because my criminal terminology is kind of rather lacking.

At some point after the indictment of David Champy, did you get involved with another case involving, quote unquote, witness tampering with respect to Mary Deary? A. Yes, I did.

Q. Can you tell me, sir, what your involvement—when you first became involved in that particular matter? A. I don't recall the date, and I don't think I have any notes anywhere that would indicate when it was. But I do recall talking to Chief Barrett about it. I don't recall whether it was on the phone or if he had come into the office and talked to me. I met with Chief Barrett I would say [10] fairly frequently since the David Champy case had come about. There was a lot of work that was being done in that case, and that's why it is hard for me to remember whether it was on the phone or in the office we talked about the situation involving Mary Deary and Mr. Rumery.

At that time I recall Chief Barrett telling me about the phone calls which—or the phone conversation that Mary Deary had related to the police department that she had had

with Mr. Rumery, and I recall Chief Barrett being very concerned because he didn't know—and he didn't want to see any intimidation of Mary Deary that would prevent her in testifying in the David Champy case. And the information that he relayed to me was certainly information sufficient to cause concern, if it was true.

Q. Okay. Now, Mr. Graf, you had met yourself, had you not, with Mary Deary on occasions? A. Yes, I had.

Q. And you had met with her with reference to what case? A. The David Champy case.

[11] Q. And in that case, was she, of course, an essential witness? A. Yes. Without Mary Deary, I don't think we could have prosecuted Mr. Champy.

Q. Now, you indicated, and I don't want to—I am sorry for breaking the train of thought here, but you indicated that Chief Barrett had discussed with you certain information that had taken place in a telephone conversation.

Can you relate to me, if you would, briefly what that informatin was that you felt was of some concern as you indicated, if it in fact was true? A. First of all, I can't remember whether the first conversation with Chief Barrett about it was over the phone or in the office, or perhaps he called me and said I have something to talk to you about, or can I come down and talk to you in the office. I don't remember which way it actually occurred, and at that point in time I can't remember the substance of the allegations.

I do recall of the allegations were true they were serious. It was not something to be taken [12] lightly. From my point of view the problem in terms of prosecuting was to try to get some corroboration of these statements so that the State would not have to rely simply upon the uncorroborated testimony of Mary Deary. But I cannot recall the exact nature of the conversation that Chief Barrett had with me.

Q. Do you have a file on this matter? A. Yes, I do.

Q. And is this the file before you? A. Yes, it is.

Q. Do you have a copy of the police report in that matter? A. Yes, I do.

Q. Could you take that out please and make reference to it.

(Witness did as directed.)

Q. Does that police report refresh your recollection in any way with regard to the items that you indicated caused you some concern if true, and if so, could you just relate and highlight those items which you felt were of significant concern? A. I recall Chief Barrett telling me, and I again don't recall whether it was the first [13] conversation we had concerning the matter, or if it was a later conversation concerning the matter, but I do remember him telling me as indicated in the report that Mary Deary had reported to the Newton Police that Mr. Rumery had made statements to the effect that if she were to go forward on the David Champy case she might end up like the two women in Lowell, Massachusetts, I believe, and there was a reference in the report to an apparent murder of two women in Lowell, Massachusetts. I don't recall in fact two women were in fact murdered in Lowell. But I do recall that particular aspect of the so-called intimidation in particular.

* * *

[14] Q. Did you feel that based on what you had been told by Mr. Barrett that there was sufficient basis for probable cause? A. Well, in the first conversation that I had with him when he actually told me about the incident, yes, I felt that if what he was telling me was true there would in fact be probable cause for the charge of tampering with a witness.

The problem that I saw as a prosecutor is at that time I would have to rely strictly on the [15] testimony of Mary Deary because I don't believe there was any other independent evidence that had taken place.

* * *

Q. Okay. Did Mr. Barrett call you and advise you that an arrest had been made and give you reasons why? A. He advised me. Again I don't recall whether he called me or he came into the office, but he did advise me that he had arrested Mr. Rumery.

[16] I was a little bit surprised because I had hoped that we would be able to put something into effect where we might be able to get some independent evidence of the alleged tampering with a witness, so that it would not be a situation where the State had to rely exclusively on Mary Deary, and I recall Chief Barrett telling me that he felt the situation had gotten out of control to such an extent that he didn't know whether or not Mary Deary would be able to testify with respect to the David Champy matter because she was so upset about what was going on, and he felt he had to act. So that's why the arrest was made.

Q. Now, you indicated that you personally would have liked to have had some corroborating evidence by some—what in particular were you referring to? A. Well, I believe we had talked about it, and I know I had thought about it of trying to perhaps have a police officer listen in on a phone conversation, whether it be through picking up an extension at Mary Deary's residence, or perhaps through a wire tap, and I knew any type of wire tap [17] would have to be approved by the Attorney General's office.

I recall that I was—my best memory is I was pretty busy at that time and I didn't have a lot of time to devote to this particular matter, as much time as perhaps I would have liked because I probably would have contacted the Attorney General's office myself to see if they had any recommendations. I don't recall having done that. But that was one thing that I believe Chief Barrett and I discussed, but I know I thought about it. Because I was quite concerned that if the allegations were true that the situation needed to be stopped.

Q. What was your next connection with the Rumery matter? A. Well, I recall Chief Barrett advising me that Mr. Rumery had been arrested, and we discussed that. As I indicated, I was surprised at that point in time that he had been arrested. And then I believe the case was probably either scheduled or prepared to be scheduled for the grand jury.

* * *

[19] Q. Now, you apparently had some conversations with Brian—with Mr. Woods. And who is Mr. Woods? A. Stephen Woods. He at that time was representing Mr. Rumery.

Q. And what is Mr. Woods' capacity today? A. He is the County Attorney for Rockingham County.

Q. Can you tell me briefly what your conversations with Mr. Woods entailed to the best of your recollection? Take the first one if you recall it all that distinctly, but what your first conversation was with Mr. Woods and what that involved? A I don't even remember how many conversations there were with him. I don't remember if there was one or really more than one concerning [20] this, but I recall that we had a conversation concerning a solution to this case in which it was discussed that the State would be willing to drop the prosecution of Mr. Rumery for the witness tampering charge in exchange for Mr. Rumery signing a release indicating that he would not sue the parties involved in the particular case. I recall we had that conversation.

Q. Do you recall who broached the subject of suit against the town? Did Mr. Woods raise that issue with you or not? A. I don't remember. I have some memory that I probably discussed the issue of a potential suit by Mr. Rumery against the town with Chief Barrett. I don't recall between Mr. Woods and myself who brought up the subject of the release or possible lawsuit, whichever way you want to look at it.

Q. In your discussions with Mr. Woods with regard to resolutions to this matter by way of your dropping the witness tampering charges against Mr. Rumery in exchange for a covenant not to sue or a release, what considerations did you give with [21] regard—what were the considerations that you yourself and your thought process with regard to entering into this settlement agreement? A. I had been advised by Chief Barrett that Mary Deary did not want to testify against Mr. Rumery. The witness tampering charge would have required Mary Deary to testify. She would have been the primary source of evidence against Mr. Rumery. There was still considerable concern about Mary Deary because the David Champy case was still pending.

I think that was a particular sensitive type of case where you are dealing with a victim of an alleged aggravated felonious sexual assault. And I think I was taking into consideration the fact that I had her as a victim of one case, and now, the State was in a position of perhaps having to force her to testify against her will perhaps causing more trauma or upset to her forcing her to go through more things than what I felt comfortable with doing. So that was one of the considerations I was taking into play at that time, that I had been informed that Mary Deary did not want to go forward with the [22] prosecution, that she felt she had gone through enough.

Q. So you did reach an agreement then with Steve—Attorney Woods? A. That's right. We discussed what I consider to be a common sense practical resolution to the problem, and that would be that the State would agree not to prosecute Mr. Rumery, and in exchange Mr. Rumery would agree that he would not sue anybody with respect to the case, and the matter would be put to rest for all parties.

Q. When you say the matter would be put to rest, you mean put to rest in all respects? A. Yes. With the exception that we were still continuing the prosecution of David Champy. And I don't believe that case had been resolved at that time.

Q. But with regard to anything with Mr. Rumery, all criminal charges were going to be disposed of, and any and all civil actions he might have would also be done away with? A. That's correct. When Mr. Rumery through his attorney agreed to that resolution of the [23] problem, and I received the covenant not to sue, the file that had been prepared for probable presentment to the grand jury was simply marked not presented and put in our closed file.

* * *

[25] Q. Did you ever meet or talk to Mr. Rumery yourself? A. I don't have any memory whatsoever of ever having seen Mr. Rumery. I'm virtually positive I never talked to him, and I don't have any memory of ever having seen him.

Q. Did you apply any pressure or anything of that nature on either Mr. Rumery or his counsel with regard to the execution of this particular covenant not to sue? A. No. I didn't. As a matter of fact, the situation was such I don't even recall who made the proposal with respect to this resolution of the [26] problem. All I can really recall at this date in time was that a proposal was made. It was a possible common sense resolution of the problem, and it was up to Mr. Rumery as to whether or not he wanted to accept this resolution.

Q. And you left that entirely between Mr. Rumery and his attorney? A. Yes, I did.

Q. But with respect to you and Stephen Woods at least, this was a common sense approach that you both agreed to and accepted? A. Well, I viewed it as a common sense approach. I really can't speak for Mr. Woods. I don't know exactly how he viewed it. But he presented it to his client, and his client signed the covenant not to sue, so I assume his client had accepted it and agreed to it.

Q. Had this agreement not been reached, Mr. Graf, you would have proceeded in the normal course with this Rumery case? A. I'm not sure what we would have done, because I didn't have to face that problem since the covenant was

executed by Mr. Rumery signed. [sic] The [27] State had to fulfill its end of the bargain. I don't know if we would have forced Mary Deary to testify through a grand jury subpoena if necessary because I didn't have to make that decision. But it was a possibility that certainly existed.

Q. For someone who is—doesn't understand the criminal procedure, are you indicating to me you could have forced Mary Deary to testify? A. If we could have subpoenaed her, we could have forced her to testify, yes. And I have every reason to believe we could have subpoenaed her.

Q. And what you are saying then is you don't know what decision you would have made under the circumstances when that decision ripened; is that correct? A. That's right.

* * *

[28] *Examination*

By Mr. Anderson:

* * *

[29] Q. Other than talking with Chief Barrett and possibly Officer Marino about this, these telephone conversations that allegedly occurred between Mr. [30] Rumery and Mary Deary, did you do any independent investigation of the evidence in that case? Or cause any investigation to be made by anybody else? A. I had discussed with Chief Barrett the desirability of trying to get some independent evidence that would not rely on Mary Deary exclusively to have to prove a tampering with a witness charge.

As I indicated previously, one of the things we discussed was perhaps having the police listen in on a phone conversation between Mary Deary and Mr. Rumery. I don't know how that phone conversation could come about, whether or not it would be legal to do that, whether or not a wire tap would be required.

I think one of the things also that I remember thinking about, I don't know if I discussed it with Chief Barrett or not, was whether or not there would be any possibility of getting any evidence from the company where Mr. Rumery was work-

ing. If my memory serves me correctly, he was some type of an insurance agent I believe and that's the reason—it was some type of a business [31] relationship between Mary Deary and Mr. Rumery that led to the call in the first place as I understand it, and I was wondering whether or not there would be any possibility of getting anybody from the company who could testify to any portions of the conversation. That as a practical matter probably would be wishful thinking, but it was something I thought maybe needed to be at least be discussed or considered.

* * *

[33] Q. Did you ever have any conversations with any of the Selectmen of the Town of Newton at the time prior to dropping the prosecution of this case [34] about the Rumery case? A. I don't think so. I don't even know who the Selectmen were. And unless you asked me by name, I wouldn't know. But I don't remember talking to any of them.

* * *

Q. But you did have some conversation with Chief Barrett before this whole matter was dropped? A. I'm fairly certainly I did talk it over with Chief Barrett.

Q. And I think my notes are correct that you—part of the discussion with Chief Barrett involved the possibility of a lawsuit against the Town of Newton and the police department by Mr. Rumery? A. That's my best memory that Chief Barrett had brought to my attention.

* * *

[35] Q. Do you recall whether you ever nol-prossed the complaint in the Plaistow District Court? A. I know I didn't do it. But I would [36] assume that Chief Barrett did. Although, like I say, I don't have any firsthand knowledge of that.

Q. How many occasions have you had since you have been involved in the practice of law as the County Attorney to

obtain a civil release in exchange for not presenting a case to the grand jury? A. This is the only case that I can think of that I have been involved with where this type of resolution is arrived at. I can think of one other case that I've handled which was a misdemeanor appeal in which the Exeter Police and defense counsel discussed the possibility of dropping that misdemeanor appeal in exchange for a release from the defendant not to file any suits as what I consider to be common sense resolution of the dispute.

But I don't recall any others that I have been involved with where the County Attorney's office did not present a matter to the grand jury.

Q. And can you give me a rough approximate figure of how many indictments you have presented to the grand jury since you have been active in the practice of law? [37] A. Well, I think I could fairly accurately say over 500. Perhaps over a thousand.

Q. Do you have any statement from Mrs. Deary in your file about this Rumery incident? A. No, I don't believe that I have any written statement from her. Her statements are incorporated into I believe Chief Barrett's report.

Q. Which has been marked as an exhibit? A. That's right.

Q. And if there were any tape recording made of a conversation of Mrs. Deary, it wouldn't have been—it's nothing that you have in your file? A. No, I don't have any tape recording.

* * *

DEFENDANT'S EXHIBIT A

[UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE]

C84-279-L

Hrg March 27, 1985

COVENANT NOT TO SUE

Covenant not to sue executed on June 6, 1983 by Bernard Rumery, of 26 Pine Street, in the Town of Danville, County of Rockingham, State of New Hampshire, herein referred to as covenantor, to Mary A. Deary, of 64 Highland Street, Town of Newton, the Police Department of the Town of Newton, and the Town of Newton, all of the County of Rockingham, the State of New Hampshire, herein referred to collectively as covenantee.

In consideration of the cessation and withdrawing of all criminal charges against the covenantor brought as a result of a claim by the first named covenantee, the covenantor does hereby agrees as follows:

1. *Covenant not to sue.* Convenantor will never institute any action or suit at law or in equity against covenantee, nor institute, prosecute or in any way aid in the institution or prosecution of any claim, demand, action, or cause of action for damages, costs, loss of services, expenses, or compensation for or on account of any damage, loss or injury either to person or property, or both, whether developed or undeveloped, resulting or to result, known or unknown, past, present, or future, arising out of the criminal charges lodged against and subsequent arrest of the covenantor.

2. *Binding effect of covenant.* This covenant shall inure to the benefit of covenantee and their heirs, assigns, successors, and legal representatives. It shall bind covenantor, his heirs, and legal representatives.

3. *Entirety clause.* This instrument reflects the entire covenant between covenantor and covenantee, and no statements, promises or inducements made by covenantor or any agent of covenantor that are not contained herein shall be valid or binding.

4. *Covenant understood by covenantor.* Covenantor has carefully read the foregoing covenant not to sue and knows the contents thereof.

In witness whereof, covenantor has executed this covenant at Exeter, N.H. this day and year first above written.

s/ BERNARD RUMERY
BERNARD RUMERY

STATE OF NEW HAMPSHIRE
ROCKINGHAM, SS.

Personally appeared the above-named, Bernard Rumery, and made oath that the foregoing is true to the best of his knowledge and belief.

s/ STEPHEN J. C. WOODS
Justice of the Peace